

No. 15923.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C. H. TROWLER, doing business as STANDARDS MAPS,
Appellant,

vs.

M. PENN PHILLIPS and M. PENN PHILLIPS, doing business as M. PENN PHILLIPS ASSOCIATES; WESTERN WOODS ASSOCIATES, WILLIAM HARWICK, JOHN KAGAN and BERT B. BRANT, doing business as HARWICK, KAGAN & BRANT; FRED W. AUSTIN, WILLIAM R. BLUMFIELD and HAROLD W. SIEDE, Copartners, doing business as INDUSTRIAL LITHOGRAPHERS,
Appellees.

Appeals From the United States District Court for the
Southern District of California, Central Division.

BRIEF OF APPELLANT.

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TOPICAL INDEX

	PAGE
Jurisdiction	1
Statement of the case.....	2
Specifications of error.....	3
Argument	4

I.

Introduction	4
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II.

The process of selecting and combining diverse materials taken from the public domain into a single map constitutes original work so as to entitle such a map to copyright protection under the copyright laws of the United States.....	5
A. The Copyright Act clearly provides that an original combination of public domain materials is, in itself, capable of copyright protection.....	6
B. The principle that an original combination of public domain materials is in itself capable of copyright protection has long been accorded judicial recognition.....	7
C. Prevailing case law indicates that a map is protectible if it consists of a selection from and combination of public domain documents.....	9

III.

Even if "new matter" were required in order to render a map copyrightable, appellant has, in fact, contributed such "new matter"	13
Conclusion	15

TABLE OF AUTHORITIES CITED

CASES	PAGE
Alfred Bell & Company, Ltd. v. Catalda Fine Arts, Inc., 191 F. 2d 99.....	14
Amsterdam v. Triangle Publications, Inc., 189 F. 2d 104.....	9, 10, 13, 14
Andrews v. Guenther, 60 F. 2d 555.....	13
Arnstein v. Poter, 154 F. 2d 464, cert. den. 330 U. S. 851.....	15
Chain Store Business Guide, Inc. v. Wexler, 79 Fed. Supp. 726....	8
Christianson v. West Publishing Company, 149 F. 2d 202.....	12
Edwards & Deutsch Lithographing Company v. Boorman, 15 F. 2d 35.....	9
Emerson v. Davies, 8 Fed. Cas. 615.....	7, 10
Farmer v. Calvert Lithographing Company, 8 Fed. Cas. 1022....	10
General Drafting Co., Inc. v. Andrews, 37 F. 2d 54.....	12, 13, 14
Hanson v. Jaccard Jewelry Company, 32 Fed. 202.....	8
Hartfield v. Peterson, 91 F. 2d 998.....	9
Woodman v. Lydiard-Peterson Company, 192 Fed. 67, aff'd 204 Fed. 921.....	11
Malkin v. Dubinsky, 146 Fed. Supp. 111.....	15
New Jersey Motor List Company v. Barton Business Service, 57 F. 2d 353.....	8
Real Estate Register, Inc. v. Baird, 97 N. Y. S. 2d 868, 85 U. S. P. Q. 223.....	8
Sheldon v. Metro-Goldwyn Pictures Corp., 81 F. 2d 49.....	13
Stanley v. Columbia Broadcasting System, Inc., 35 Cal. 2d 653, 221 P. 2d 73.....	8

STATUTES

Copyright Act, Sec. 7	6, 9, 10, 13
United States Code, Title 17, Sec. 7	6, 9, 10, 13
United States Code, Title 28, Sec. 1291.....	1
United States Code, Title 28, Sec. 1338(a).....	1

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BRIEF OF APPELLANT.

Jurisdiction.

These are consolidated actions for copyright infringement. [R. 38.] Jurisdiction of the District Court was invoked under 28 U. S. C. Sec. 1338(a) on the ground that the causes arise under the Copyright Laws of the United States. [R. 3, 8, 23, 28.] Judgments were entered December 3, 1957 [R. 49, 52, 55] and February 27, 1958. [R. 83.] Notices of Appeal were filed December 31, 1957 [R. 55-56] and March 4, 1958. [R. 83.] This Court has jurisdiction under 28 U. S. C. Sec. 1291.

Statement of the Case.

Pleadings. These are four consolidated [R. 38] actions for copyright infringement. Three of the actions (211-57-HW, 219-57-HW, 221-57-HW) allege infringement of Appellant's copyrighted maps entitled "Hesperia". [R. 5, 10, 30.] One of the actions (179-57-HW) alleges infringement of Appellant's copyrighted maps entitled "Antelope Valley, Portion of Kern County—San Bernardino County." [R. 25-26.] Appellees filed Answers [R. 14, 11, 32, 34] and Appellee in action 211-57-HW also filed two Counterclaims [R. 19-20.] However, subsequently the aforesaid Counterclaims were dismissed without prejudice by stipulation of the parties. [R. 46.]

Affidavit of Appellant. At a Pre-trial Conference the Federal District Court ordered Appellant to prepare and file an Affidavit as to his method of preparing the maps involved in all of the said actions. In accordance with said order, Appellant filed such an Affidavit on October 22, 1957, under the title "Affidavit of Charles H. Trowler." [R. 39-42.]

Motions for Summary Judgment. Subsequent to the filing and serving of the aforesaid Affidavit of Charles H. Trowler, Appellees in actions 211-57-HW, 219-57-HW and 221-57-HW made a Motion to Dismiss, for Judgment on the Pleadings and for Summary Judgment. [R. 44.] The District Court granted such Motion. [R. 45-46.] Thereafter, Appellee in action number 179-57-HW made a motion for Summary Judgment [R. 57-59], and the District Court granted such Motion. [R. 77.]

Findings, Conclusions and Judgment. Findings of Fact, Conclusions of Law and Judgment were entered on December 3, 1957 [R. 47-49, 50-52, 53-55] and February 27, 1958. [R. 81-83.] With respect to the Appellant's

map of Hesperia (the subject of actions 221-57-HW, 219-57-HW, 211-57-HW) the District Court found that Appellant "added nothing to the map of whose infringement he complains, that was original or novel" [F. IV], and concluded that such map "is not entitled to copyright under the Copyright Laws of the United States, Title 17 U. S. C. 1 *et seq.* for want of original work." [C. I.] With respect to the map of Antelope Valley (the subject of action 179-57-HW) the District Court found that said map "lacks sufficient originality resulting from the independent effort of the plaintiff to entitle it to be copyrighted" [F. I.] and concluded that Appellant "has no valid copyright" upon such map. [C. I.] Thus, with respect to each of the actions herein consolidated, the District Court's findings and conclusions related solely to the copyrightability of Appellant's maps.

Specifications of Error.

1. The District Court erred in granting Appellees' Motion for Summary Judgment in each of the actions herein consolidated.

2. The District Court erred in concluding, as a matter of law, that the maps which Appellant complains were infringed in each of the actions herein consolidated are not entitled to copyright under the Copyright Laws of the United States for want of original work.

3. The District Court erred in finding that the facts set forth in Appellant's Affidavit dated October 18, 1957 [R. 39-42] did not constitute original work, which would entitle Appellant to copyright.

ARGUMENT.

I.

Introduction.

The District Court in its Findings of Fact for each of the actions herein consolidated [R. 47-48, 50-51, 53-54, 82] has, in effect, found to be true the statements of fact set forth in Appellant's Affidavit dated October 18, 1957 [R. 39-42], which Affidavit is hereinafter referred to as the Trowler Affidavit.*

The central issue presented by this appeal is whether under the facts set forth in the Trowler Affidavit the District Court was justified in finding that, as to the map of Hesperia, Appellant added nothing "that was original or novel," and that Appellant is not entitled to copyright in the map "for want of original work" [R. 48-49, 51, 54], and in further finding that the map of Antelope Valley "lacks sufficient originality resulting from the independent effort of the plaintiff to entitle it to be copyrighted." [R. 82.] The Trowler Affidavit indicates that Appellant engaged in three distinct processes in creating the maps in question. First, Appellant assembled a number of public domain maps and tract sheets and judiciously selected cer-

*The Findings of Fact in Civil Action 179-57-HW [R. 82] do not expressly repeat the allegations of fact set forth in the Trowler Affidavit. It is to be noted, however, that the Trowler Affidavit sets forth in detail the manner in which Appellant created a map of Hesperia, which is the subject matter of the infringement actions in 211-57-HW, 221-57-HW, and 219-57-HW. The action in 179-57-HW relates to the alleged infringement of a map of Antelope Valley. Since the District Court accepted the statements of fact in the Trowler Affidavit relating to the creation of the Hesperia map, it is to be assumed that the District Court likewise accepted as true the statement in the Trowler Affidavit that: "In preparing my map of Antelope Valley I followed substantially the same procedure as that set forth above, with respect to my map of Hesperia." [R. 42.]

tain elements from each of these documents, creating for the first time a combination of such elements into a single map of Hesperia. [R. 39-41.] Appellant then added certain additional elements to the map as a result of his personal observation. [R. 41.] Finally, Appellant drove extensively in the area and personally verified the accuracy of the elements contained in the map [R. 41-42] and made certain changes in the map as a result of such verification. [R. 42.] In determining whether the District Court erred in concluding, as a matter of law, that the maps in question are not entitled to copyright under the Copyright Law of the United States for want of original work, and in finding that the facts set forth in the Trowler Affidavit do not constitute original work, which would entitle Appellant to copyright, it will be helpful to examine the aforesaid three-step process in two parts: first, Appellant's endeavors in selecting and combining public domain elements, and then Appellant's additions and verifications by personal observation.

II.

The Process of Selecting and Combining Diverse Materials Taken From the Public Domain Into a Single Map Constitutes Original Work so as to Entitle Such a Map to Copyright Protection Under the Copyright Laws of the United States.

Notwithstanding the facts set forth in the Trowler Affidavit as to the Appellant's work in selecting and combining diverse public domain materials into a single map [R. 39-41], the District Court, in granting summary judgment for Appellees, found that such a map is not entitled to copyright protection. This is the basic error of the decision below.

A. The Copyright Act Clearly Provides That an Original Combination of Public Domain Materials Is, in Itself, Capable of Copyright Protection.

The decision of the District Court is irreconcilable with the clear provisions of the Copyright Act, as set forth in 17 U. S. C., Sec. 7 which provides:

“Compilations or abridgments, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain, or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this title; but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works.”

Under Section 7 of the Copyright Act, as quoted above, where public domain material is merely “republished”, then “new matter” must be included in order to render the work protectible under the Copyright Act. It is to be noted, however, that under Section 7 if the work constitutes a compilation, abridgment, adaptation, or arrangement of public domain works, then such work is entitled to copyright protection, notwithstanding the absence of “new matter.” The originality necessary to support a copyright for such a work is found not in the contribution of new matter, but rather in the labor involved in compiling (or abridging, adopting or arranging) works in the public domain. The Trowler Affidavit clearly establishes that Appellant compiled in his map material gathered from a number of public domain works. [R. 39-41.] Likewise,

the Trowler Affidavit indicates that Appellant's map constituted an abridgment, adaption, and arrangement of public domain works. [R. 39-41.]

B. The Principle That an Original Combination of Public Domain Materials Is in Itself Capable of Copyright Protection Has Long Been Accorded Judicial Recognition.

The basic principle of copyright law, which Appellant seeks to invoke herein, was recognized as early as 1845 when Mr. Justice Story stated in *Emerson v. Davies*, 8 Fed. Cas. 615, 618, No. 4438 (C.C.D. Mass., 1845):

"The question is not whether the materials which are used are entirely new, and have never been used before; or even that they have never been used before for the same purpose. The true question is, whether the same plan, arrangement and combination of materials have been used before for the same purpose or for any other purpose. If they have not, then the plaintiff is entitled to a copyright, although he may have gathered hints for his plan and arrangement, or parts of his plan and arrangement from existing and known sources. He may have borrowed much of his materials from others, but if they are combined in a different manner from what was used before, and *a fortiori* if his plan and arrangement are real improvements upon the existing modes, he is entitled to a copyright in the book embodying such improvement."

The work of the Appellant in compiling and arranging his map, as described in the Trowler Affidavit [R. 39-42] clearly brings his work within the above quoted principle. The Appellant has arranged and combined materials found elsewhere in a manner that constitutes "real improvements upon the existing modes," in that prior to Appellant's work no map of Hesperia was available to the

public. [R. 39.] This same principle was recognized more recently by the California Supreme Court in *Stanley v. Columbia Broadcasting System, Inc.*, 35 Cal. 2d 653, 664, 221 P. 2d 73, 79 (1950), where it is stated:

“An author who takes existing materials from sources common to all writers, arranges and combines them in a new form, giving them an application unknown before, is entitled to a copyright, notwithstanding the fact that he may have borrowed much of his materials and ideas from others, provided they are assembled in a different manner and combined for a different purpose, and his plan and arrangement are a real improvement upon existing modes; for the labor of making these selections, arrangements and combinations has entailed the exercise of skill, discretion and creative effort.”

The above principle has been recognized in numerous copyright cases, wherein a work consisting of a combination or compilation of materials taken from public domain records has been recognized as protectible. Thus, the following cases have held the indicated works to be protectible: *New Jersey Motor List Company v. Barton Business Service*, 57 F. 2d 353 (D.N.J., 1931): A list of names, addresses and other information selected from the registration records of the State Commissioner of Motor Vehicles; *Real Estate Register, Inc. v. Baird*, 97 N. Y. S. 2d 868, 85 U.S.P.Q. 223 (1950): A “Real Estate Register” containing information about real estate obtained from public records; *Chain Store Business Guide, Inc. v. Wexler*, 79 Fed. Supp. 726 (S.D.N.Y., 1948): Data obtained from telephone books; *Hanson v. Jaccard Jewelry Company*, 32 Fed. 202 (C.C.Mo., 1887): Listing of Civil War battles and statistical data obtained from public

records; *Hartfield v. Peterson*, 91 F. 2d 998 (2d Cir., 1937): Compilation of code phrases taken from existing sources; *Edwards & Deutsch Lithographing Company v. Boorman*, 15 F. 2d 35 (7th Cir., 1926): An interest and discount table taken from public domain material.

C. Prevailing Case Law Indicates That a Map Is Protectible if It Consists of a Selection From and Combination of Public Domain Documents.

The provisions of 17 U. S. C., Sec. 7, quoted *supra*, and the legal principles established in the above cited cases, are, of course, as applicable to maps as they are to other copyright material. Nevertheless, Appellees, in the Court below, relied largely on a map case which, it is submitted, is contrary to the mandate of Section 7 of the Copyright Act (17 U. S. C., Sec. 7, quoted *supra*), and is contrary to the principles of copyright law repeatedly applied by the courts in cases cited *supra* and *infra*. The map case relied upon by Appellees is *Amsterdam v. Triangle Publications, Inc.*, 189 F. 2d 104 (3d Cir., 1951). In this case the Court held that a map is not copyrightable unless the copyright claimant has personally surveyed the elements depicted in the map. Thus, the Court in the *Amsterdam* case in effect held that a compilation, abridgment, adaptation or arrangement of public domain materials in a work is not copyrightable unless such work also contains new matter obtained by personal observation. Yet, as indicated *supra*, 17 U. S. C., Sec. 7, clearly provides that a work shall be copyrightable notwithstanding the absence of "new matter" if it consists of "compilations or abridgments, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain." The *Amsterdam* Court stated that "The presentation of information available to everybody, such as is found on

maps, is protected only when the publisher of the map in question obtains originally some of that information by the sweat of his own brow." Thus, the *Amsterdam* Court did not attempt to limit the principle there invoked to maps, but applied it generally to "the presentation of information available to everybody." Yet, it is clear from the cases cited *supra* that information "available to everybody" may indeed be the subject of copyright where the copyright claimant selects and combines such information into a new compilation, abridgment, adaptation or arrangement. The *Amsterdam* case can only be reconciled with existing statutory and case law by the fact that the plaintiff in that action apparently did not seek to invoke the provisions of 17 U. S. C. Sec. 7.

However, Appellant need not rely merely on the provisions of Section 7 of the Copyright Act and numerous copyright cases in other fields. There are a number of copyright cases referring expressly to maps which support Appellant's position. Thus, in *Emerson v. Davies*, *supra*, the Court stated at page 619:

"A man has a right to the copyright of a map of a state or country which he has surveyed *or caused to be compiled from existing materials*, at his own expense or skill or labor, or money." (Emphasis added.)

Another early copyright case expressly indicated that public records may be the basis of a copyrightable map. Thus, in *Farmer v. Calvert Lithographing Company*, 8 Fed. Cas. 1022, No. 4651 (C.C.Mich., 1872), the Court stated at page 1026:

"But it is contended that boundaries of townships are not a legitimate subject of copyright—that they are fixed and defined by statute law, and that the marking of them down upon paper is but a transcrip-

tion in another form of the legal enactment. What is claimed in this regard is true in regard to all original materials from which maps are made, and that is that none of them are subjects of copyright—they are open to all, but no one has the right to avail himself of the enterprise, labor and expense of another in the ascertainment of those materials, and the combining and arrangement of them, and the representing them on paper.”

The principle that an author may obtain a valid copyright on a map where the information contained in such map is gathered from other publications, and not by direct observation, is further confirmed in the case of *Woodman v. Lydiard-Peterson Company*, 192 Fed. 67 (C.C.Minn., 1912), aff'd 204 Fed. 921 (8th Cir., 1913). In that case the Court found that the plaintiff had, in fact, contributed new matter to his map. However the Court indicated that the plaintiff's map would have been protectible even without such new matter. Thus, the Court stated at page 69:

“It is also suggested that there is nothing original in the map of the complainant; that he himself secured all his material, not from original research, but from other publications. The fact that he did secure all this material from other publications which were not copyrighted, does not, to my mind, prevent him from getting a copyright upon this map, if it constitutes a new arrangement of old materials; and that this map does constitute a new arrangement of old material I think is apparent. It contains some parts of Carver County; *it contains more than had appeared upon any one piece of paper or map of that character; it is a combination of the Government and other maps.*” (Emphasis added.)

Here, again, the factual similarity to the present case is apparent. Appellant's map of Hesperia also "contains more than had appeared upon any one piece of paper or map of that character; it is a combination of the Government and other maps." [R. 39-41.]

In *General Drafting Company, Inc. v. Andrews*, 37 F. 2d 54 (2d Cir., 1930), the plaintiff was held to have a copyrightable map, although none of the elements contained therein were discovered by plaintiff's direct personal observation after he had originally been informed of them either through other documents or through personal interviews with engineers. The plaintiff, in the *General Drafting* case, followed a process somewhat similar to that of the Appellant in the present case, in that he made a large tracing of assembled section maps, but selected only such information as he thought would be of use to motorists. That is, he selected highways, rivers, town, state lines, etc. In holding that the plaintiff had achieved a copyrightable map, the Court stated at page 55:

"The elements of a copyright consists in the selection, arrangement, and presentation of the component parts."

The case of *Christianson v. West Publishing Company*, 149 F. 2d 202 (9th Cir., 1945), although cited in the District Court's Conclusions of Law [R. 49, 51, 54], does not support Appellees' position. In the *Christianson* case the Court held that the plaintiff's map was not copyrightable. However, it is to be noted that in that case the plaintiff slavishly copied an outline map of the United States, containing state boundaries. Obviously, this contains no creative element of selection, arrangement or presentation. The fact that the plaintiff in the *Christianson* case also evolved a color scheme is not of importance,

since the Court found that the defendant had not copied from the plaintiff, but had evolved its own color scheme.

Maps have been held to be “compilations,” or “arrangements” within the meaning of 17 U. S. C., Section 7 (formerly Sec. 6). (*General Drafting Company, Inc. v. Andrews, supra.*) Yet, if the judgments below are here affirmed the provisions of Section 7, at least in its application to maps, will, for all practical purposes, become a dead letter. This would be directly contrary to a clearly expressed Congressional intent. Moreover, such a decision would wreak havoc in the map industry, which generally relies upon the provisions of Section 7. It is, perhaps, more important that the provisions of Section 7 be applied in the map industry than in other areas, since, as has been noted, “in the case of maps of compendia . . . later works will necessarily be anticipated.” (*Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F. 2d 49, 53 (2d Cir., 1936).)

III.

Even if “New Matter” Were Required in Order to Render a Map Copyrightable, Appellant Has, in Fact, Contributed Such “New Matter.”

A comparison of the facts set forth in the Trowler Affidavit [R. 39-42] and the facts indicated in the opinions in *General Drafting Company, Inc. v. Andrews, supra* (wherein plaintiff’s copyright was upheld), and in *Amsterdam v. Triangle Publications, Inc., supra*, and *Andrews v. Guenther*, 60 F. 2d 555 (S. D. N. Y., 1932), cited by Appellees in the District Court, indicates that Appellant, in the present case, contributed more original material by direct observation than did the plaintiff in any of the above cited cases. Appellant, by his own di-

rect, personal observation, noted the location of the old historical hotel, the golf course, the Chamber of Commerce Building, the Community Hall, the Fire Station, and the proposed hotel site, and in each case, by such direct observation and by his ability as a map maker indicated the location of each of these items in his map. [R. 41.] He also determined the section numbers by his own computations based upon the townships and ranges specified in the San Bernardino County maps. [R. 41.] Appellant also drove extensively in the area and personally verified the accuracy of the elements contained in the map [R. 41-42] and made certain changes in the map, as a result of such verification. [R. 42.] In the *General Drafting* case none of the material contained in plaintiff's map was first discovered by him by direct, personal, observation. Yet plaintiff was held to have a copyrightable map. In the *Amsterdam* case the plaintiff did not, in the first instance, obtain any material contained in his map from direct, personal, observation.

“With the exception of the names of the few very small secondary roads, *which were obtained from real estate developers*, all the information shown on the plaintiff's map came from maps already in existence . . .” (Emphasis added.) (*Amsterdam v. Triangle Publications, Inc.*, *supra*, at p. 105.)

It is important to note that in copyright cases the courts will not take on the role of judging the artistic merit or value of an author's contribution. As was stated in *Alfred Bell & Company, Ltd. v. Catalda Fine Arts, Inc.*, 191 F. 2d 99, 102, 103 (2d Cir., 1951):

“A copy of something in the public domain will support a copyright if it is a distinguishable variation . . . No matter how poor artistically the

author's addition, it is enough if it be his own. *Bleistein v. Donaldson Lithographing Company*, 188 U. S. 239, 250."

Appellees can hardly claim that Appellant's map is indistinguishable from the array of public domain works upon which it was based. The mere fact that no single map, prior to Appellant's map, contained all of the features set forth in Appellant's map [R. 39] constitutes Appellant's map a "distinguishable variation" of prior works. Moreover, the question of whether an author has made an original contribution to a work is an issue of fact, which should not be determined upon motion for summary judgment. (*Arnstein v. Porter*, 154 F. 2d 464 (2d Cir., 1946), cert. den. 330 U. S. 851 (1947); *Malkin v. Dubinsky*, 146 Fed. Supp. 111 (S. D. N. Y., 1956).)

Conclusion.

For the foregoing reasons Appellant submits that the decision of the District Court should be reversed.

Respectfully submitted,

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